United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1011

B
P/S

To be argued by
H. RICHARD UVILLER

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH MAGNANO, a/k/a "Joe the Grind", FRANK PALLATTA, a/k/a "Bolot", and a/k/a "Nose", RICHARD BOLELLA, ANTHONY DeLUTRO, a/k/a "Tony West", ANTHONY SOLDANO, a/k/a "Tony",
Defendants-Appellants,

LOUIS MACCHIARGLA, a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO, a/k/a "Donnie Boy", FRANK FERRARO, a/k/a "Skooch", CARMINE MARGIASSO, a/k/a "Charlie", JOSEPH MALIZIA, a/k/a "Patsy Pontiac", ERNEST MALIZIA, FRANK CARAVELLA, JOHN GWYNN, WILLIAM CHAPMAN, a/k/a "Chappy", ST. JULIAN HARRISON, FRANK LUCAS, GERARD CACHOLAN, a/k/a "Coco", ROBERTO RIVERA, and GABRIEL RODRIGUEZ, a/k/a "Cass", a/k/a "Cassanova",
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANT-APPELLANT, ANTHONY DeLUTRO

H. RICHARD UVILLER
Attorney for Defendant-Appellant,
Anthony DeLutro
435 West 116th Street
New York, N. Y. 10027
(212) 280-4160
(914) 534-9202

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

Table of Contents

TABLE OF AUTHORITIES

Cases: Page

Table of Authorities

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- JOSEPH MAGNANO, et al., Defendants-Appellants.	76-1011

PRELIMINARY STATEMENT

This is an appeal by the defendant-appellant Anthony DeLutro from a judgment of the United States District Court for the Southern District of New York, entered December 3, 1975, convicting him after trial (Cooper, USDJ, and a jury) of the crimes of CONSPIRACY to violate enumerated sections of Title 21 pertaining to the distribution and possession with intent to distribute narcotic drugs [21 U.S.C. § 846], and DISTRIBUTING AND POSSESSING WITH INTENT TO DISTRIBUTE A NARCOTIC DRUG [21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A)]. DeLutro was sentenced to serve concurrent terms of twenty-five years in prison with a specified parole period of six years to follow (509a).* He is at present in confinement pursuant to that judgment.

---

* Parenthetical numbers followed by the letter "a" refer to pages of the appellant DeLutro's appendix.

THE EVIDENCE

The Government's Case

Mario Perna, the Government's first witness, testified that he was released from federal prison on May 5, 1972, and in late February, 1973, met with Ernest Malizia (453).* At the meeting, the two men agreed to form a partnership for the illegal distribution of narcotic drugs (454). Sometime thereafter, a third person, Anthony Verzino, joined the partnership and the three men made numerous purchases and sales of narcotic drugs from and to several people. Sometime during the month of November, 1973, Malizia told Perna that Verzino had met and spoken to somebody named "Tony West" [DeLutro] who could obtain "pure goods" for a price of approximately $50,000 (22a). Verzino said that Tony West had told him that he could get all the pure goods the partnership required if they could "come up with the money" (22a-23a). The partnership put together about $200,000 in cash and went downtown to attempt to obtain 5 kilos from Tony West (23a). They went to a bar on 30th Street and Second Avenue at which time Verzino said that he would leave the others to make contact with Tony West (23a-24a). Twenty minutes later, Verzino returned reporting he had given the money to West along with the keys to his car (24a). Malizia and Perna told Verzino they were moving to another bar nearby and Verzino left for another hour or so (24a).

---

* Parenthetical numbers without the letter "a" refer to pages of the original transcript of the record.

Upon his return, he told the others that "everything went well. He had the goods" and the partners should go together to their "plant" (24a). The witness, Perna, never observed DeLutro transfer drugs to anyone or receive money for a drug transaction (32a). The witness also testified that in his presence on a later occasion at the same bar, Malizia and Verzino discussed with Tony West a supposed shortage of 10 ounces in the quantity of narcotics previously delivered to the partnership by DeLutro (46a).

The witness acknowledged that he had been arrested for a narcotics transfer and pleaded guilty before Judge Cooper to charges carrying a maximum of ninety years and had further agreed to plead guilty to additional federal charges and three state charges carrying sentences of 8 1/3 years to life each (949-50). He had an express and recorded agreement with the Government concerning consideration for his cooperation which was explained by the court to the jury (37a-43a). The witness also admitted participation in a conspiracy in Florida to import some 200 kilos of cocaine (1039-41). He admitted that between January, 1970, and December, 1972, which included time he had spent in prison, he had also conspired to import and distribute 200 kilos of pure heroin (26a-28a). He also admitted that he had tried to murder one William Sorenson, a co-conspirator, while in prison (966), that he had agreed to kill his partner, Verzino, together with Verzino's wife and Sorenson for a man named Joseph Stassi in 1972 (28a-29a), and that in 1974, he tried to have one

Johnny Condella kill his partner Verzino "as a favor" and had provided the weapon for that purpose (30a). In September, 1974, with 6 others he escaped from federal detention at West Street (1111), and he admitted to having sworn falsely in another case (1051). He also admitted an effort to bribe the witnesses against him in the Florida cocaine conspiracy case (1392).

Valcocean Littles of the New Jersey State Police testified that he had arrested Malizia on a warrant in December, 1973 (1424-28).

Joseph Brzostowski, a special agent with the Drug Enforcement Administration (DEA), testified that he had arrested Perna, along with others, in February, 1974 (1428-44).

James Bradley, a special Agent of the DEA, testified that in November, 1973, he met Perna in New Jersey with Condella and heard them speak of past and future drug sales between them. A few days later, he witnessed a transfer of 1/8 kilo for $4,000 between the same two men. Three or four similar transactions followed (1445-78). Bradley further confirmed Perna's plan to murder Verzino and testified that he had received weapons for the purpose from Perna (1479-80, 1486). On February 1, 1974, Perna was arrested after transferring a suitcase containing 8 kilos of heroin to Condella for the sum of $200,000 in cash (1488-94).

Luciano B. Caputo, a handwriting expert, identified certain writings taken from Perna's possession (1574-1614).

Jane M. Sullivan introduced some telephone records relating to the defendant Gwynn (1614-18).

Joseph P. Salvemini, a supervisor with the DEA, told of certain conversations he had had with the defendant Gwynn (1619).

John Vasquez also testified to matters relating to the defendant Gwynn (1631).

Michael Peterson, formerly an agent of the DEA, testified to a surveillance of a Government informer (1738).

William Simpson, an undercover agent of the DEA, offered testimony relating to Gwynn (1751).

Kieran Kobell, a special agent of the DEA, gave some evidence relating only to Gwynn (1824).

Anthony Verzino testified that he had been arrested on February 25, 1974, with 26 pounds of heroin in his possession (1842). He admitted having sold heroin in large amounts since 1959 (1844). He was released from federal prison at Atlanta in August, 1973, and met with Perna and Malizia shortly thereafter (1845). The witness testified that in November of 1973, he met DeLutro, whom he had known for some time, in a restaurant called Raymond's on 29th Street and Second Avenue (47a-48a). After preliminary talk of mutual friends, DeLutro offered the opinion that "goods was high" (50a). There was some further discussion of the price of "goods" and Verzino concluded that he would let DeLutro know if he was interested (50a-51a). Verzino then discussed the matter of buying pure heroin from DeLutro with his partners and they decided to do so notwithstanding the high price (51a-52a). Shortly afterward, he went back to Raymond's, leaving his partners to wait in a nearby bar, and met DeLutro again (52a-53a).

After some dickering, Verzino offered to purchase five kilos at $50,000 per kilo (53a). They agreed that the transfer would take place the following evening (56a). He then discussed the arrangement with his partners (56a-57a). The partners put together $234,000 the following day and went downtown to consummate the transaction (57a). The witness recounted how the sale and transfer was accomplished (58a-67a). At their plant, the partners weighed and tested the drugs for purity. While they were satisfied concerning the quality, they found a shortage of over 8 ounces in weight (68a-69a). Verzino then called DeLutro at Raymond's about the discrepancy (71a). And the following day, the partners once again went downtown where Verzino found DeLutro and told him of the shortage (71a-72a). The differences, however, were apparently adjusted and the partners paid the balance of their debt to DeLutro (72a-73a).

Clarence Williams, a New York City police officer, testified that he had executed a search warrant in the apartment of the witness Verzino on February 25, 1974 (2656-7).

George Taylor, a New York City police officer, gave similar testimony (2660).

Joseph Rollo, a police sergeant in the New York City Police Department, described the evidence seized pursuant to warrant at the time of Verzino's arrest, including $550 - $600,000 worth of heroin (2695).

John Noel Lawler (2862-75), Jeffrey Hall (2898-2903), and Paul Bucetti (2904), all agents of the DEA, testified, but their

evidence did not bear in any respect on the case against DeLutro.

DeLutro's Defense

Rosario Oddo testified that he was a bartender at Raymond's Restaurant and that, in January of 1974, Verzino had come into the bar asking for DeLutro who was out of the city on that day. Verzino returned sometime thereafter and argued with DeLutro about Verzino's wife (82a-123a).

Andrew Risoli, an attorney who knows DeLutro and frequents Raymond's Restaurant, overheard the argument between Verzino and DeLutro (124a-142a).

Murray Zimmerman, another customer at Raymond's, also witnessed the commotion and argument between Verzino and DeLutro (142a-154a).

Maryann Fasio (155a), and Edward Fazio (174a) also witnessed the argument and testified to their recollections.

Jerome Rosenberg, a state prisoner serving a term for murder, (183a-185a), stated that he had never communicated with Tony DeLutro in any manner (184a). Rosenberg studied law by correspondence while in prison (187a), and in 1965, while in the death house, he received an academic certificate for the completion of a course in criminal law and procedure (188a). Subsequently, he was awarded the degree of LLB, and thereafter the degree of LLD while still in prison (189a). The witness stated that while in prison, he was consulted by other inmates and advised them on legal problems hundreds of times, representing them in federal and state courts on 22 occasions (193a-

194a).

While in Sing Sing prison in March, 1974, the witness met Tony Verzino who came to him seeking legal help (194a-195a). Verzino showed Rosenberg a copy of a search warrant which had been executed on the day of his arrest, February 25, 1974, and asked for an opinion on its validity; Rosenberg offered his opinion that the warrant was valid (196a-197a). The warrant itself had been left in Rosenberg's possession, was produced in court, but was not admitted in evidence (197a-198a). A couple of days later, Rosenberg saw Verzino again, this time in the prison law library (202a). The witness attempted to pinpoint the date of that meeting as March 4th (203a). On this occasion, Verzino asked Rosenberg whether he knew or had ever heard of Tony West and Rosenberg replied in the negative (205a). Verzino then said, "That son of a bitch, I am going to get him" "By hook or crook. I already got him once; I am going to get him again" (206a). When Rosenberg inquired about the problem, Verzino explained, "he has been fucking my wife" (206a-207a). Verzino then told Rosenberg that he intended to frame DeLutro by fabricating evidence against him in a "junk case" (207a). Rosenberg attempted to dissuade Verzino but did not take him seriously until he read a newspaper article in February of 1975 while in Dannemora; he thereafter got in touch with DeLutro's trial counsel (229a-230a).

The defendant, Anthony DeLutro, testified on his own behalf (261a). He acknowledged a 1971 conviction for selling whiskey without a $54 tax stamp (262a). He stated that he had known Anthony

Verzino for about 15 years, but denied that he had engaged in narcotics transactions with him in the years 1961 through 1964 as Verzino had testified (264a-265a). The defendant recounted how he had seen Verzino talking to a stranger in Raymond's Restaurant (266a). After the stranger left, the defendant and Verzino spoke of a girl in the bar who was a prostitute (267a). Verzino also introduced the defendant to "Fannie Pontiac" or "Mario" [Malizia] (267a-268a). The three men discussed meeting the girl and the defendant eventually made the introductions (268a). While the defendant was walking in the company of Verzino from one bar to another, he saw a car come by, sound its horn, and he noticed that the driver was the person to whom Verzino had been speaking earlier in Raymond's (269a). When Verzino saw the car and its driver, he took his leave of DeLutro and DeLutro saw no more of him (269a). DeLutro denied that he had had any conversation with Perna or Verzino concerning the transfer of narcotics (270a). He also denied Verzino's testimony that a substantial sum of money had been paid to him for five kilos of heroin, or that he had delivered those drugs (271a).

In late January, 1974, the day after DeLutro's return from Las Vegas, he was in Raymond's talking to some patrons when he heard someone ask for him (274a-276a). Verzino marched in and confronted DeLutro with the following: "What is this I hear about you f'n [sic] around with my wife." (276a). Verzino made some indefinite threat such as "We'll see about that" and left. DeLutro next saw him on the witness stand (277a).

DeLutro described his occupations as owner of a cafe-espresso store selling Italian coffee and pastries, a commission salesman for a flower shop on Lexington Avenue, and a "sort of manager" of Raymond's (278a). He stated that he had invested no money in Raymond's and was not yet on the payroll, though he hoped he would be in the future (278a-280a). The defendant denied having met Ernest Malizia, Anthony Soldano, Frank Pallatta, or Joseph Magnano prior to their arrest in the instant case (315a-319a). After lengthy cross-examination, DeLutro reiterated the essential features of his direct testimony (376a-387a).

Government Rebuttal

Reginald Lee, an employee of the New York City Department of Corrections, testified from departmental records that Anthony Verzino, following his arrest, was lodged in the Manhattan House of Detention until March 4, 1974, when he was transferred to Riker's Island, and the following day, March 5, 1974, sent to Ossining (Sing Sing prison)(432a-435a).

QUESTIONS PRESENTED

1. Was there a variance between the single inclusive conspiracy alleged in the indictment and the multiple conspiracies revealed by the proof, and, if so, did it harm the defendant DeLutro who had, at worst, ar isolated transaction with one of the core conspirators?

2. Did the trial court, in its charge to the jury, provide adequate guidance for judging whether the evidence had established a unitary conspiracy, and for finding whether DeLutro had joined that inclusive conspiracy as alleged?

3. Did the court below, in its charge, unfairly tip the balance of credibility in favor of the Government witnesses and against the defendant DeLutro as a witness for himself?

4. Did the Prosecutor erroneously withhold materials helpful to the defense and constructively in his possession in violation of his obligations pursuant to 18 U.S.C. § 3500?

5. Did the court below erroneously admit evidence highly prejudicial to the defendant DeLutro, namely: (1) a huge cache of currency taken from the possession of a co-defendant at the time of his arrest eleven months after the termination of the conspiracy by the last alleged or proven act in furtherance of the conspiracy and

the incarceration of the core conspirators; and (2) testimony that on unspecified prior occasions one of the Government witnesses had had dealings in narcotic drugs with the defendant DeLutro unrelated to the charges?

SUMMARY OF ARGUMENT

The proof at trial failed to sustain the charge in the indictment that all defendants, and others, joined in a single conspiracy with the Government witnesses to distribute narcotic drugs. More specifically, the proof varied from the pleading insofar as the single separate transaction in which the defendant DeLutro was said to have furnished a large quantity of pure heroin on a cash basis constituted no component of the various purchases and sales of diluted drugs which the Government witnesses concluded on credit with other defendants and registered in coded records. Moreover, the voluminous evidence, including prejudicial exhibits, adduced at the trial by the prosecution severely injured DeLutro's chance of securing a fair and unbiased jury evaluation of his defense as to the substantive charge.

The trial court, in instructing the jury on the law applicable to the crime of conspiracy, offered only the most rudimentary guidance on the important issue of the association of the defendant DeLutro with the single encompassing conspiracy alleged. Indeed, as the law was stated for the jury, they were told in effect that

if they found that the Government witnesses had agreed with one another to distribute drugs, they might find DeLutro guilty under the conspiracy count if they found that he had implicitly had a similar accord with them in the drug transaction ascribed to him. If not erroneous, the charge was both misleading and insufficient for a fair jury appraisal of a crucial issue in this case. For the evidence required a careful explanation to the jury of the variable circumference of a complex conspiracy, with adequate communication of the possibility that all who deal in drugs with one another may not be parties to the identical conspiratorial agreement.

The trial court further erred in its instructions by an unfair disparity between the treatment of the credibility of the Government witnesses and of the defendant as a witness on his own behalf. While suggesting unmistakably the possibility of truthful testimony, despite significant impediments, on the one hand, the court offered no similar allowance for the defendant, dismissing him with a brisk reminder of his paramount bias.

Despite the fact that the prosecution had in its files evidence which would go far toward discrediting one of its witnesses, while at the same time undermining a principal Government contention to the effect that the witness turned truthful and was assisting the Government in good faith at the time he tendered his accusations against the defendant DeLutro and the others, that material was not turned over to the defendants until after the conclusion of the trial.

At the time of his arrest, well over half a million dollars in currency of small denominations was seized from the home of DeLutro's co-defendant, Lucas. The money was received in evidence against all defendants on the theory that Lucas' possession of it was an act committed during and in furtherance of the conspiracy. The ruling was prejudicially erroneous. That the grand jury had charged that the life of the conspiracy embraced the time at which the money was discovered was of no moment, despite the trial court's express reliance on it. Nor was there a fiber of evidence, however frail, to support the judge's view that the money was connected in some manner with the activities of the conspirators. Rather, the record demonstrates that the charged conspiracy expired with the incarceration of its three nuclear members and no act was alleged or proved during the eleven months which passed between that terminal event and the seizure of the cash. The conspiracy having been terminated by the enforced cessation of any further activity toward its ends, and the evidence being wholly unconnected with the former project, its possession by Lucas could not have been taken in any way against DeLutro.

The court also allowed into evidence against DeLutro the testimony of one of the Government witnesses who said that on some prior occasions, long antedating and having no connection with the crimes at issue, he had purchased large quantities of heroin from DeLutro. Unelaborated, this damaging averral bore no visible relevance to any trial issue, except the forbidden conjecture that having

dealt with each other before in drugs, the parties might have done so at the time in issue. While advising the jury not to consider the evidence of prior similar acts for this purpose, the significance of the evidence as explained by the judge was virtually unintelligible. He allowed it as it bore on the "background and development" of the charged conspiracy, a bearing so elusive as to be illusory.

POINT I

THE RECORD REVEALS THE ERROR OF "VARIANCE" WHICH WAS GRAVELY PREJUDICIAL TO THE DEFENDANT DeLUTRO

Introduction

This case presents another example of a pattern of Government prosecution which is by now tediously familiar to this Court. Two distributors of narcotics (mostly heroin), who by background and fully proven activity are thoroughly despicable criminals, serve as the Government's star witnesses. They relate innumerable and diverse transactions in which, as partners, they acquire drugs from some of the defendants and sell them to others over an extended period of time. Scraps of paper seized from the witnesses link them to some of their suppliers and customers. All with whom they had illicit dealings are joined together by the indictment in a single conspiracy generally to violate the narcotic laws, and tried together. Whatever their substantive crimes, however limited their part in the ongoing business of the witnesses, all defendants at the mass trial suffer the peculiar evidentiary consequences of the alleged conspiracy: not only must they bear the onus of the culpable actions and statements of their co-defendants, but the proven and acknowledged culpability of the Government witnesses themselves becomes heavy evidence against each defendant.

Moreover, in this too common distortion of the crime of conspiracy, the central element of the offense is obscured if not

lost behind assumptions and inferences designed to ease the attainment of the Government's worthy objective of punishing "organized" narcotics traffic [see Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 920, 933-5(1959)]. Traditionally, the vital ingredient of a conspiracy has been agreement among two or more persons to engage in a particular unlawful act. Accord in a clear and definite objective may, of course, be inferred from conduct. Yet, as employed here the crime of conspiracy spins into realms as strange to American jurisprudence as the lettres de cachet of old. For the object crime as alleged has been transformed from a specific event into a diffuse criminal purpose which may (and, as proven, did) involve a number of crimes associated only by a common penal statute and the identity of some perpetrators.

Since any single narcotics transaction signifies agreement between the parties to it, and hence the existence of a conspiracy, any and all who engage in any other transfer with one of the original parties may (under the trial court's instructions) be said to have "adopted the agreement" and thereby become members of the same conspiracy. Thus, in effect, the element of mutual purpose may be satisfied by any criminal contact with any person who has had or will have contact violating the same statute with anyone else. How large the association and the nature of the unseen enterprise chargeable to the defendant are beyond his ken, much less his knowing assent. This is neither a"chain" nor a "wheel" conspiracy, but a galaxy where an association between any two bodies incorporates both in a vast

system of interactions.

The Government having cast the net broadly on the single conspiracy theory (to switch to the conventional metaphor), it then falls to appellate counsel and this diligent Court laboriously to sort out the proof to demonstrate the obvious: the activities reflected in the evidence are not one but several distinct conspiracies. But even the establishment of the error of variance little harms the Government case unless an appellant succeeds in an even more difficult and problematic task: locating actual prejudice suffered by the Government's self-serving mispleading. No litmus tests for prejudice. The record cannot preserve the mental processes of jurors nor reveal the searing effect of misallocated proof. Yet, in the instant case, the defendant DeLutro may rightfully assert that, as to him at least, both the variance and its harm are manifest.

The error of variance

According to the testimony of one of the Government witnesses, marginally confirmed by the other, DeLutro on a single occasion transferred to the witness a substantial quantity of heroin, distinguished by its high concentration from most of the drugs otherwise bought by these partners. The specific unit of heroin which the witnesses said they purchased from DeLutro was never traced to subsequent purchasers to connect DeLutro with any such later sales "agreements." And not the frailest filament linked DeLutro to other unrelated acquisitions by the witnesses from other defendants claimed to be suppliers. Moreover, the isolated transaction with DeLutro

was not reflected in the partners' "business records" for whatever that evidence might be worth in delineating a unitary venture. Nor did the transaction with DeLutro resemble the credit-and-reorder character of the witnesses' customary business; the deal with DeLutro was, according to the Government testimony, a single sale for cash "up front".

From this record, no "mutual dependence and assistance" can be reasonably inferred between DeLutro and the other defendants orbiting around the Government witnesses [United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975); United States v. Bertolotti, ___F.2d ___(2d Cir., Nov. 10, 1975)]. The aims and purposes of DeLutro and the others were not "common" [United States v. Agueci, 310 F.2d 817 (2d Cir. 1962); United States v. Bertolotti, supra], but parallel. As in Bertolotti, supra, the record contains no evidence linking DeLutro to the other defendants in a single overall conspiracy, the only common factor between the DeLutro transaction and the activities of the others was the participation of the Government witnesses. And as this Court stated on the authority of United States v. Kotteakos, 328 U.S. 750 (1946), "[t]his type of a nexus has never been held to be sufficient." [United States v. Bertolotti, supra, at p. 6419; see also, United States v. Tramunti, supra, at p. 1106.]

Prejudice

Yet, despite this manifest variance between pleading and proof, DeLutro had to sit with seven other defendants through five weeks of trial while scores of transactions were described, as

highly inflammatory evidence unrelated to his case was displayed to the jury (see, e.g., 1488-94), as the Government witnesses' accounts of their relations with other defendants were seemingly confirmed by their own coded records, and finally have his case submitted to the jury on instructions allowing them to convict him of conspiracy upon the evidence of others' guilt.

Since the Supreme Court (United States v. Kotteakos, supra) and this Court (United States v. Bertolotti, supra) have both regarded numbers as important in the assessment of harm, we add that DeLutro was indicted with nineteen co-defendants along with six additional named but unindicted co-conspirators. The first count charging conspiracy recited twenty-four overt acts, two of which referred to DeLutro. In addition to the conspiracy charge, the indictment contained sixteen substantive counts, only one of which accused DeLutro. We shall not attempt to tally or recapitulate the many events and transactions described in testimony under these multiple charges, nor try to parse the record for distinct conspiracies. Suffice it to say that thousands of pages of proof detailed the activities of the Government witnesses with defendants other than DeLutro, and the agreement ascribed to DeLutro remained unrelated to all the other operations of the witnesses, however their legal number may be computed.

Rarely are the evils of unwarranted mass conspiracy prosecutions as clearly demonstrated as here. This Court is not insensitive to these hazards. Often and repeatedly it has warned and

chastised the Government for what may be most generously regarded as expedient groupings [see United States v. Bertolotti, supra at p. 6419]. In DeLutro's case, that unheeded lesson must be taught again. His tainted conviction for a conspiracy he never joined cannot stand.

Even as to the substantive count, the "spill-over" of proof against the co-defendants is likely to have had serious prejudicial effect. Taken alone -- as it would have been had he been separately tried -- the persuasiveness of the inculpatory evidence is in considerable doubt. DeLutro's own testimony and the independent evidence he adduced sharply contradict the Government's proof while describing a forceful motive for vindictive perjury by DeLutro's principal accuser.

Under oath and unshaken by cross-examination, DeLutro denied the story of the Government witness, Verzino. Without the overstatement which often betokens falsehood, DeLutro indicated that the drugs he was said to have sold might have been supplied by another individual unknown to him at Raymond's. This would account for the Government witness' later statement to a third party that he had acquired pure narcotics "downtown". Also without embellishment, DeLutro furnished a good reason why his name and the restaurant telephone number might have been carried by the core conspirators: he had introduced them to a prostitute. Further, DeLutro related a later encounter at Raymond's Restaurant at which Verzino had angrily accused DeLutro of having sexual relations with Verzino's wife. As

witnesses, the bartender and several patrons added their recollections of the loud altercation between DeLutro and Verzino at the restaurant. A prison inmate "lawyer", Jerome Rosenberg, who was a stranger to DeLutro, testified that while at Sing Sing (where the warden permitted him to maintain a "law office") he had met Verzino who had sought his "professional opinion" regarding a search warrant, a document which Verzino left in Rosenberg's possession and which the latter produced in court to confirm the contact between the two men. In the course of their conference, Rosenberg recalled, Verzino had told him that he would frame DeLutro on a narcotics charge because DeLutro had been sexually intimate with Verzino's wife. Rosenberg's testimony was rebutted only by showing a discrepancy of one day between his recollection of the date of his talk with Verzino and the date the latter arrived at the institution where Rosenberg was lodged.

Considering this forceful defense in the absence of prejudicial spill-over, the jury might well and reasonably have entertained sufficient doubt of DeLutro's complicity to acquit him.

Conclusion

Our system is still, despite occasional Governmental lapses, a system of individual justice. A defendant, however reprehensible the accusation, is entitled under this enlightened concept to have the evidence against him weighed and his own conduct judged without contrived association to the illegal activities of others. Particularly where the amorphous device of conspiracy is utilized, courts

must zealously guard against the erosion of the blessing of individualized judgment. Not only are the liberties of free people at stake, but the continued and proper place of the law of conspiracy itself is threatened For in its misuse, thoughtful people are becoming increasingly concerned over palpable intimations of tyranny. Alone among our enumerated crimes, conspiracy exposes the individual to penal consequences by reason of the activities of supposed associates, and without proof of a substantive misdeed. The crime was not intended and should never be employed simply as a means for joining under a single accusation alleged criminals of like stripe. Rather the crime constitutes a basis for early Government intervention when a combination of people, by sharing a specific evil design, threaten future harm. In the interests of preserving this important social instrument of security, the time has come for courts to move the law back to closer congruence with the statute's purpose. Public faith in the law of conspiracy can be restored only by strong judicial disapproval of its malextension. The reversal of DeLutro's conviction, obtained by false joinder in an overly broad and erroneously singular conspiracy, would not only serve justice in his own case, but would provide welcome instruction to the Government and assurance to the people that the application of the law of conspiracy will be bounded by its legitimate purpose [see Johnson, The Unnecessary Crime of Conspiracy, 61 Cal. L. Rev. 1137 (1973)].

POINT II

THE COURT BELOW COMPOUNDED THE ERROR OF VARIANCE BY CONFUSING AND INADEQUATE INSTRUCTIONS REGARDING THE CONSPIRACY COUNT

From DeLutro's standpoint, a critical mission of the trial court's instructions regarding conspiracy was to explain how a single transfer of narcotics, necessarily implying agreement with the transferee to violate the narcotics laws in that instance, would not necessarily associate DeLutro with different or larger conspiracies in which the transferee might have joined with others for a similar purpose. Thus, a careful charge on the point might have allowed the jury, in effect, to correct the error of variance by simply finding that the evidence failed to sustain DeLutro's membership in the overbroad conspiracy alleged. Accordingly, DeLutro submitted a comprehensible request to charge, predicated on United States v. Kotteakos, 328 U.S. 750 (1946), which included the following language: "If you find separate conspiracies and that some of the defendants belonged to one and not to the other, then there would be no proof of the single conspiracy charged in the indictment. . ." (DeLutro's Request #13). The request was denied without comment or stated reason (3678).

In many respects, the court's instructions to the jury, and indeed his relations with the jury throughout the trial, exhibited an extraordinary concern with their thorough understanding of the proceedings, their role in them, and the principles of law

necessary to their proper performance. It is evident even from the cold record that Judge Cooper prides himself -- and with good reason -- in the assiduous attention he devotes to the dignity, comfort, and education of his jury. In light of his meticulous care, it is the more startling to discover that the judge slighted almost to the point of extinction a crucial issue in the case and a matter upon which the jury surely required particularly careful guidance.

In the twenty pages of the charge addressed to the law of conspiracy (449a-469a), the court does not once allude to the question of the scope of the conspiracy. Indeed, this portion of the charge conveys the unmistakable impression that if other defendants had conspired to violate the narcotic laws and DeLutro agreed with one of them to violate the same laws, he necessarily became a part of their conspiratorial venture. At least in this segment, the court never contemplates the possibility that the defendant DeLutro's conspiracy (if any) was distinct from the general scheme alleged, although it had similar illegal objective and shared a conspirator in common. Rather, in describing for the jury the three elements under the first count, the court simply states (and restates) the first proposition that if an agreement is found between any two or more of the conspirators, the jury might find that the conspiracy alleged had been proven. Next, the judge told the jury, they should consider whether a defendant by his actions joined knowingly in the

general conspiracy already established. While such a simple description of the law might well serve in another case, it hardly sufficed in this case which presented a real and troublesome question of the perimeter and singularity of the alleged conspiracy.

Turning finally to the important issue, and having by that time quite possibly sown considerable misunderstanding, the court in two or three sentences notes that the jury must find a "single overall conspiracy" in order to convict under the first count (473a). But even this explicit instruction misses the crux of the case, for it is coupled with words addressed to the problem of mutation, the conspiracy which alters its objective during its course, an issue not presented by our facts. And when the subject of "multiple conspiracies" is raised expressly and accorded brief treatment (475a-477a), the words of the court are more misleading than instructive in the context of the case under consideration. True, the court did inform the jury that any defendant must be acquitted unless they find that he was a member of the conspiracy charged in the indictment and not some other scheme (476a). But the court immediately went on to say:

> In determining whether a given conspiracy exists you may consider what the evidence shows as to the changes of personnel and activity. You may find a single conspiracy even though there were changes in personnel or activities, provided you find that some of the conspirators continued throughout the life of the conspiracy and that the purposes of the conspiracy continued to be those charged in the indictment.

> The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants the conspiracy would be the same basic scheme even though in the course of its operation additional conspirators joined in and performed additional functions to carry out the scheme while others were not active or had terminated their relationship. (477a)*

Translating the general language into concrete application, the jury might well have understood the court to say that if the two Government witnesses continued in their basic purpose of violating the narcotics laws throughout the period (which, of course, they obviously did), then the single conspiracy charged in the indictment was proved and defendants, such as DeLutro, entering and exiting for his brief encounter with the nuclear conspirators, necessarily joined that single charged scheme. Indeed, it is difficult to apply the instruction to the present record to mean anything but that. And the court, with uncharacteristic brevity, offered the jury no further elucidation on this issue.

In its false emphasis and thin treatment of an essential issue of the case, the court's instructions contravene the holding

---

* In this portion, incidentally, the trial judge seems to have borrowed half of a passage in the charge employed in United States v. Borelli (infra, 336 F.2d at p. 382, n.1) -- the half most favorable to the Government, for in these few words the court seemed to tell the jury that the changing participants and different activity should not be regarded as inimical to the Government's theory. The omitted portion of the Borelli charge might have kept the scale in balance.

of United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), in which Judge Friendly wrote (at p. 386, n.4):

> In cases like this the existence of a conspiracy is not usually in serious question: the controverted issues are the various defendants' connections with it. The court always charges that this must be determined on an individual basis; we hold only that where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all or nothing basis as to all defendants.

And in language which seems even more remarkably directed to the charge in the present case, Judge Friendly characterized as "a considerable over-simplification" the view adopted below that evidence showing that some defendants were parties to a single agreement necessarily shows participation by every defendant "who has conspired with them at any time for any purpose" (id. at p. 384).

Nor should the lack of express exception to this portion of the charge deprive DeLutro of recourse to the preceding argument in this Court. The trial court's outright denial of his request to charge adequately preserves the point. For the language requested, while not as fully developed as it might have been, surely served to alert the court that DeLutro required a better exposition of the issue than that given. And in the factual posture of the case, the court's misleading and ill-balanced charge may be regarded as plain error.

POINT III

THE TRIAL COURT'S INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL INSOFAR AS THE COURT UNDULY SUPPORTED THE CREDIBILITY OF THE GOVERNMENT WITNESSES

Judge Cooper is obviously a very patriotic person. He took numerous occasions from the selection of the jury through his charge at the conclusion of the case to convey and elicit pride in the American system of justice. While such praise for the institution may not be inappropriate even during a trial, it can become dangerous in a criminal case where the Government itself is a party. For example, at the conclusion of the preamble to his charge, Judge Cooper pointed with pride to what he deemed a unique feature of American justice, the proposition that as a litigant the Government starts with no advantage (439a-440a). As the judge marvelled, he may have inadvertently created the impression that the entire experience of civilized society (apart from our own) provides some basis for the belief that the Government deserves an initial advantage. Equality of footing does not begin with appreciation for the sacrifice by one of the parties of the superior position which almost everyone agrees it should occupy.

To reinforce the importance of the jury's independent fact-finding power and of the necessity for taking the law from the court, the judge noted that the interests of their "respective clients" are "bound to rub off" on counsel on "either side of the table" (441a).

This remark was then expanded to apply only to defense counsel, however, with "examples" which refuted important defense arguments and improperly lent credence to the prosecution case. In the first example, the judge referred to defense counsel who "without meaning to mislead you" had emphasized in summation the lack of corroboration for the testimony of Perna and Verzino, the Government's principal witnesses (441a). The law, the court informed the jury, does not require corroboration and "to insist that there must be or should be supportive or corroborative testimony is to add a requirement not countenanced by law" (442a). While perhaps accurate in some respects, this comment unfairly detracted from the force of a proper and important defense contention: that the crucial evidence from suspect witnesses should not be credited by the jury without some independent verification. Surely, the judge should not have characterized this argument as one not "countenanced" by law.

In his next "example", the judge recalled that defense counsel had emphasized the "corruptability" of Perna and Verzino, "as well they might." "However," the court continued, immediately undermining the argument, "you do not consider the testimony of Perna and Verzino in isolation or in a vacuum, as it were. It is to be estimated, assessed, and evaluated in conjunction with all the evidence in the case. . ." (442a). The suggestion is patent that, thus viewed, the flaws and biases of the witnesses are reduced if not removed.

A bit further along, the court again adverts to the testimony of Perna and Verzino, this time as "accomplice testimony" (481a). Having told the jury that they should consider as bearing on credibility the fact that the Government witnesses are accomplices or have criminal records, the judge immediately adds: "It is to be expected that the participants in an enterprise so unholy and so illegal will not be upright gentlemen." (481a). Not content with that, the court continued as follows (481a-482a):

> You must realize, I am sure, that in the prosecution of a trial the government is frequently called upon to use witnesses who are accomplices. Often it has no choice. This is particularly so in the case of conspiracy. Frequently it happens that only the members of the conspiracy and he [sic] or their accomplices have evidence which is relevant to and important to the case.
>
> However, it does not follow, because a person has acknowledged participation in a crime, or is an accomplice, or has a criminal record, that he is not capable of giving a truthful version of what occurred. That is for you to decide.
>
> As with courage, so it is with truthfulness. It frequently comes from the most unlikely sources. Those from whom we rightfully expect the truth very often we find it not forthcoming, and those from whom we would hardly expect it, from them sometimes a veritable avalanche of convincing disclosure gushes forth.
>
> The testimony of such persons, however, should be viewed with caution, must be scrutinized with the utmost circumspection.

However accurate the court's observation, however carefully he abstained from direct comment on the credibility of these witnesses, the jury might well have derived the impression that the judge was

satisfied that, despite their defects in character, Perna and Verzino were just the sort of unlikely sources of truth he had in mind. The judge's feeling in this regard must have become still clearer when the jury compared his words regarding Perna and Verzino with his advice concerning the credibility of the defendants themselves as witnesses. No philosophical musing here to the effect that truth frequently comes from those with a clear interest in the outcome, no reflection on the fact that his paramount interest in acquittal impels an innocent defendant to truth not falsehood. On the contrary, the court rather briskly leaves the question to the jury to decide, cautioning them only that the defendant on the stand has the strongest motive to lie of all witnesses. The entire portion follows (483a):

> What about a defendant who did testify? Two of them took the stand. What has the law got to say as to them? As to DeLutro and Gwynn?
>
> The law permits, but does not require, a defendant to testify in his own behalf. The testimony of DeLutro and Gwynn is before you. You and only you can determine how much credibility or believability their testimony is entitled to or how little.
>
> However, I instruct you that it is the law that interest creates a motive to give false testimony, that the greater the interest the stronger is the temptation, and that the interest of a defendant in the result of a trial is of a character possessed by no other witness and is, therefore, a matter which may affect the credence which shall be given to his testimony.
>
> However, let me point out that the fact that the defendants DeLutro and Gwynn have such an interest in the case does not mean that they will testify falsely. It is for you, the jury, to decide whether they testified truthfully and how much weight to give to their testimony.

The defendant DeLutro expressly noted his exception to the disparity in the court's treatment of the credibility of the Government witnesses and the defendant in his own behalf (4124-5).

POINT IV

THE GOVERNMENT ERRONEOUSLY WITHHELD IMPORTANT MATERIAL IN VIOLATION OF 18 U.S.C. § 3500

The main thrust of the collective defense at trial was that the Government witnesses, Perna and Verzino, were untruthful and, by secret pact between them, had misled the Government, naming the defendants falsely in order to conceal the identities of their true suppliers and assure Perna and Verzino reentry into their illicit business after collecting the leniency tendered by the Government in exchange for their supposed cooperation. DeLutro in particular, undertook to show that he had been included in the accusations of Perna and Verzino for malicious and extraneous reasons, and as a result of the witness' callous disregard for truth and their obligation to assist the Government in good faith. While DeLutro was able to demonstrate Verzino's vengeful motivation and threat, he had no hard evidence to discredit the marginal support which Perna lent to Verzino's accusation. While Perna admitted to several major narcotics crimes committed both in and outside of prison (955, 1039-40), as well as perjury (1051), and acknowledged a few attempts to murder co-conspirators, (966, 29a, 30a), to corrupt witnesses against him (1392), and to escape from prison (1111), the defense had little material to demonstrate that having undertaken to assist the Government, Perna would readily deceive them. Indeed, the prosecutor argued twice on summation, free of contradiction, that following his recapture, Perna fully and truthfully assisted the Government (3725,

3759).

After the conclusion of the trial, on November 11, 1975, the prosecutor revealed to the defense for the first time documentary evidence of an attempt by Perna to deceive the Government at the very time the prosecutor had claimed his full and open cooperation began. By letter, the Assistant U.S. Attorney surrendered copies of Perna's statements given in interviews conducted by Government agents in October, 1974, concerning the circumstances of Perna's escape from the old Federal Detention Center on West Street. In the first two of these statements to the F.B.I., Perna recites in great detail and particularity how he had personally made three keys out of a strip of brass he had torn loose from a stair tread (486a-498a; 499a-504a). In the third he states that his earlier versions had been false, designed to "misdirect the investigation so as to avoid implication of [family, friends, associates, and a member of the clergy]" whom he desired to "protect" (505a-507a).

Perna's confessed deception, the verisimilitude of his concoction, and the purposeful effort to throw the Government off the scent of his true confederates, all evident in this material, would have provided the defense with extremely valuable ammunition. From the contents of these documents the defense and the jury would have learned that even Perna's self-accusatory declarations could not be trusted. The defense hypothesis that Perna lied concerning his criminal partners to shield people important to him, even at the ex-

pense of others, would have received important support. Moreover, the Government position was that Perna cornered could be trusted, that fear for his own fate invested his declarations with honesty. Obviously, this assertion might have been seriously damaged by the revelation of deceit in just such circumstances.

These important documents resided in Government files for eleven months prior to the commencement of trial below. That they may not have been in the possession of the Government attorney in charge of the instant prosecution is of no moment [Giglio v. United States, 405 U.S. 150, 154 (1972); see also Santobello v. New York, 404 U.S. 257, 262 (1971)]. Upon their belated receipt of the material, counsel for DeLutro at once moved below for a new trial, arguing the importance of the deprivation and citing Kyler v. United States, 297 F.2d 507, 511 (2d Cir. 1961), United States v. Morell, No. 74-1827 (2d Cir. Aug. 9, 1975), and Napue v. Illinois, 360 U.S. 264 (1959). That motion was denied.

Even apart from any retrospective efforts to assess the effective impact of the hidden documents on Perna's credibility [see Rosenberg v. United States, 360 U.S. 367, 371 (1959); United States v. Consolidated Laundries, 291 F.2d 563, 570 (2d Cir. 1961)], it is indisputably clear that failure to disclose the material violated section 3500 of Title 18. And that departure from a specific command of Congress - to say nothing of the breach of a constitutional obligation - itself infects the judgment with reversible error [see United

States v. Kotteakos, 328 U.S. 750, 764-5 (1946)]. But in the present instance, and more especially in DeLutro's case, it is apparent that the Government's omission was not a mere technical error, but a matter of substantial import which could well have affected the outcome.

POINT V

HIGHLY PREJUDICIAL EVIDENCE WAS ERRONEOUSLY ADMITTED AGAINST DeLUTRO

Cash taken from Lucas

A vast quantity of evidence was wrongly weighed against DeLutro by reason of the failure of the proof to sustain the single conspiracy theory of the prosecution. But even removing, arguendo, the error of variance and its consequences, one item was admitted against DeLutro (and others) which should not have been received even under the widest ambit of the alleged conspiracy. It is normally difficult to gauge the impact of any particular piece of evidence in a trial comprising as many incidents and exhibits as this one. No such difficulty attends the introduction of the item in question. It must have provided a dramatic and memorable moment in the trial with severe reverberations in the jury's consideration of the case.

At the time of the defendant Frank Lucas' arrest, on January 28, 1975, the police seized from his possession a suitcase containing about $585,000.00 in small denominations (2877-8). The currency was admitted into evidence against all defendants and exhibited to the jury (2769). The defendants other than Lucas objected on the grounds that the money was unrelated to the conspiracy with which they were all charged, and was extremely prejudicial.

It will be recalled that the alleged conspiracy revolved about the two "middlemen," Perna and Verzino, together with a third

partner, Ernest Malizia, who was (presumably) a fugitive at the time of the trial. The conspiracy was formed in the beginning of the year 1973: the first overt act alleged in the indictment was a conversation between Malizia and Perna in February, 1973, and Perna testified, that meeting began the conspiracy (453-5). The incidents alleged and described in testimony continued until all three of the partners were arrested and put out of action in custody. The date of Verzino's arrest, the last of the three, was February 25, 1974. The penultimate overt act occurred on that date: the possession of approximately 26 pounds of heroin by Verzino and the defendant Caravella. This was the quantity seized from Verzino at the time of his arrest. No evidence of conspiratorial activities by anyone was adduced after that date. The last overt act cited in the indictment, of course, was the possession of the cash in question by Lucas on January 28, 1975 (14a).

It is clear, then, from both pleading and proof that the conspiracy had ended some eleven months before the cash was found in Lucas' house. Lucas, meanwhile, had been active in both legal and illegal enterprises on his own (Lucas' defense at trial, pp. 3500 et seq. , indicated a substantial financial interest in real estate, and this Court may take judicial notice of the proof at a later trial in the Southern District of New York at which Lucas and others were tried for illegal dealings in narcotic drugs. In that conspiracy, Lucas participated in the role of supplier and the

identical item - the bags of cash - was received in evidence as the proceeds of the separate illegal transactions there alleged. That Lucas and the others were acquitted of those charges, we submit, does not preclude present consideration of the evidence indicating that the money in question might well have been related exclusively to transactions wholly independent as well as subsequent to the conspiracy here at issue.) Under these circumstances, it would be a grave mistake to regard Lucas' possession of the money as a conspiratorial act for evidentiary purposes binding on DeLutro. The connection between the money and the conspiracy of which DeLutro was allegedly part is entirely too tenuous, being wholly without support in the proof. The prejudice to the defendants from the introduction of this hoard clearly outweighed any possible probity of the evidence on the trial issues of the existence of and membership in the conspiracy charged.

In ruling for admission of the money into evidence against all defendants, the trial judge suffered one of his relatively few lapses from careful reasoning. He ruled that the possession of the money was within the period of the conspiracy because the grand jury had charged that the conspiracy continued until the filing of the indictment (2854). While this might have been the only possible reason to think the conspiracy survived the incarceration of its central characters, it afforded no basis for the court's ruling. Difficult as it may be, the question of the duration of a conspiracy for

evidentiary purposes is surely not answered by the allegations of the accusatory instrument.

During his charge, the judge offered some further comments on this item and the reasons for its admission into evidence (443a):

> After all, there is nothing unusual about the end product of any illegal enterprise. The financial return is the be all and end all of the undertaking. Even when playing a game there comes a time when someone picks up the marbles.

Since no exception was noted, we do not assert the error except insofar as the judge's inapt homily reflects the basis for his ruling on the evidence. As such, the court's reasoning was unfounded since the record offers no shred of proof to support his conclusion that the funds held by Lucas, or any part of them, were the "end product" of Lucas' association with the defendant's scheme; there certainly was no reason to conclude that Lucas, a customer of the partnership, was picking up the marbles at the end of the game.

The literature is surprisingly scant on the question of the duration of a conspiracy beyond the last alleged or proved overt act or substantive crime in furtherance of its object. The principal issue which has concerned appellate courts appears to have been the matter of an expressly alleged or necessarily implied agreement to conceal the unlawful scheme, which subsidiary purpose might serve to keep the entire arrangement alive [see, e.g. Krulewich v. United States, 336 U.S. 440 (1949); Lutwak v. United States, 344 U.S. 604 (1953); Grunewald v. United States, 353 U.S. 391 (1957)]. That

transparent device for the promotion of conspiratorial longevity, however, does not figure in the present case. Nor is this an instance where a defendant asserts his dissociation by an affirmative act of withdrawal and voluntary renunciation [see, e.g., Hyde v. United States, 225 U.S. 347, 369 (1912); United States v. Borelli, 336 F.2d 376, 388 (1964)], or is effectively severed by reason of his own incarceration [see, e.g., United States v. Borelli, supra at p. 389; United States v. Agueci, 310 F.2d 817 (2d Cir. 1962)].

Finally, among the circumstances which may end a conspiracy, basic hornbook doctrine includes the achievement of the objective for which the combination was formed. Where, as in our case, the alleged object is itself a continuous illegal enterprise, the moment of its accomplishment is usually not ascertainable. The concept of termination by completion, however, is far from meaningless. For frustration as well as success may complete the project. The interference of an external impediment may interrupt the progress of the conspiracy and result in an indefinite or permanent cessation of all activities in furtherance of its illegal end. Thus, without the declaration or manifest will of the conspirators, the conspiracy may be terminated by the clear destruction of the necessary freedom of its core members to pursue its ends. The Supreme Court, in Dutton v. Evans, 400 U.S. 74 (1970), contrasting the Georgia hearsay rule, seemed to assume that in a federal conspiracy case, the imprisonment of the conspirators would put the affair in its "concealment"

phase -- beyond the evidentiary consequences of a conspiracy-in-progress.

While mere quiescence may not itself signify the death of the conspiracy, the protracted inactivity of all conspirators, coupled with the dramatically changed circumstances inherent in the removal of the scheme's nexus, clearly betoken an expired crime. To regard the present conspiracy as having lived in suspended animation, a ghost awaiting some artificial future date when its traces may be deemed to have finally disappeared from the Earth, surely misjudges the life cycle of a conspiracy.

In sum, then, the evidence taken most favorably to the prosecution revealed an arrangement based upon the activities of Perna, Verzino, and Malizia, starting with the formation of their illegal association and concluding with their inactivation by incarceration. The possession of a large sum of cash by one of the erstwhile members of the conspiracy, almost a year after its termination and connected in no way with its pursuit, should not have been received or considered as evidence against anyone but Lucas (if indeed it was relevant as to him).

Prior similar acts

After extensive debate, the trial judge permitted the Government witness, Verzino, to testify that he had had several prior narcotics transactions with DeLutro, purchasing 2, 3 or 5 kilos of pure heroin from him on unspecified occasions long before the commencement of the alleged conspiracy (1865, 1993). During the trial, and

again in his charge, the judge informed the jury that such evidence was not to be considered evidence that the defendants had committed the crimes charged, nor was it evidence of "propensity" to commit them; rather the evidence was accepted only to show the "background and development" of the conspiracy charged (1860-3; 4098-9).

In his negative instructions, the court was surely correct [see, United States v. Smith, 283 F.2d 760, 763 (2d Cir. 1960); United States v. Byrd, 352 F.2d 570 (2d Cir. 1965); United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967)]. Notwithstanding the judge's warnings, however, it was error to admit the evidence for the purpose stated. A prior unrelated transfer of narcotics had no relevance whatever to the trial issues other than the impermissible inference of "criminal character or disposition." No connection was or could have been established between the bare statement of these previous contacts and the "development" years later of the conspiracy in issue. To designate the evidence "background" is, at best, so vague as to be meaningless in terms of relevance and, actually, invited the jury to engage in just the sort of speculation prohibited. What value could the jury derive from the testimony that Verzino and DeLutro had dealt with each other before, except as it implied that they dealt with each other in the instance at issue? Naturally as that connection might occur to the minds of the jurors, it is precisely that sort of glaring prejudice against which the authorities speak [see, e.g., United States v. DeCicco, 435 F.2d 478, 483 (2d Cir. 1970)].

POINT VI

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT DeLUTRO ADOPTS SUCH POINTS AND ARGUMENTS OF CO-APPELLANTS HEREIN AS MIGHT BE APPLICABLE TO DeLUTRO'S CASE

CONCLUSION

THE JUDGMENT CONVICTING THE DEFENDANT DeLUTRO SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

H. RICHARD UVILLER
Counsel for DeLutro

March, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH MAGNANO, a/k/a "Joe the Grind", FRANK PALLATTA, a/k/a "Bolot", and a/k/a "Nose", RICHARD BOLELLA, ANTHONY DeLUTRO, a/k/a "Tony West", ANTHONY SOLDANO, a/k/a "Tony",

Defendants-Appellants,

LOUIS MACCHIARGLA, a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO, a/k/a "Donnie Boy", FRANK FERRARO, a/k/a "Skooch", CARMINE MARGIASSO, a/k/a "Charlie", JOSEPH MALIZIA, a/k/a "Patsy Pontiac", ERNEST MALIZIA, FRANK CARAVELLA, JOHN GWYNN, WILLIAM CHAPMAN, a/k/a "Chappy", ST. JULIAN HARRISON, FRANK LUCAS, GERARD CACHOLAN, a/k/a "Coco", ROBERTO RIVERA, and GABRIEDI RODRIGUEZ, a/k/a "Cass", a/k/a "Cassanova",

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 951 E. 17th Street, Brooklyn, New York, 11230
That on March 2, 1976, she served 1 copies of Appendix and 2 copies of Brief for the Defendant-Appellant, Anthony DeLutro,
on

ROBERT B. FISKE, JR.
US Attorney,
Southern District of New York,
Attorney for Appellee
1 St. Andrew's Plaza,
New York, New York 10007

GRETCHEN WHITE OBERMAN,
277 Broadway,
New York, New York.

Gilbert Epstein,
100 Church Street,
New York New York.

Robert Blossner, Esq.,
250 Broadway,
Jeffrey Hoffman, Esq.
233 Broadway,
New York, New York.

John Gwynn,
U.S. Penitentiary,
Lewisburg Pa,
17837

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
2nd day of March, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977